SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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BISON CAPITAL CORPORATION

Plaintiff,

- v -

HUNTON & WILLIAMS, LLP,

Defendant.

INDEX NO. 153793/2015

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

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HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of contract, defendant Hunton & Williams LLP moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the second amended complaint ("SAC") of plaintiff Bison Capital Corporation ("Bison").

In February 2004, Bison and its president, Edwin E. Wells, Jr. ("Wells") entered into a contract with nonparty ATP Oil and Gas Corporation ("ATP"), wherein Bison agreed to help secure a financing source for that company, which was facing imminent bankruptcy ("Contract"). In exchange, ATP agreed to pay financing compensation in the form of 1 to 1 ¼ percent of the "aggregate value" of "each" financing (termed a "Capital Transaction") "arranged" in the future by that financing source if approached by Bison on ATP's behalf before April 1, 2004. The Contract provided for a one-year post termination period in which new financing agreements could be consummated.

Bison, through Wells, successfully facilitated a relationship between ATP and a major investment bank (Credit Suisse First Boston) with the latter ultimately providing 14 rounds of junk bond financing to ATP over the course of several years. ATP's stock market value rose from less than $130 million in early 2004, to $1.76 billion by 2007, and its oil and gas reserves grew from $788 million to $4.2 billion at the end of 2011. ATP paid Bison for the first financing arranged with Credit Suisse. It did not pay for the others.

The Federal Litigation

In 2010, Bison retained defendant Hunton & Williams to represent it in litigation against ATP in the United States District Court for the Southern District of New York. The parties first appeared before Magistrate Judge Andrew J. Peck who issued a Report and Recommendation in June 2010 recommending that the case not be dismissed but noting that the Contract contained certain ambiguities. Following a four-day bench trial, Judge Sidney J. Stein issued his findings of fact and conclusions of law on about March 8, 2011.[1] Judge Stein found that ATP breached its Contract by failing to pay Bison for ATP's entry into the second Capital Transaction with Credit Suisse, consummated on September 24, 2004, and the third Capital Transaction which, although consummated on April 14, 2005, was sufficiently far enough along as of April 1, 2005, to be deemed a financing arrangement. Bison's claims for fees from the eleven other Capital Transactions were denied because their arrangements or agreements occurred after the

[1] *See Bison Capital Corp. v. ATP Oil & Gas Corp.*, 2011 WL 8473007 (SDNY 2011) (Stein, J), *affd* 473 Fed Appx 40 (2d Cir 2012).

April 1, 2005 termination date. Judgment was entered in favor of Bison in the amount of $1.65 million plus interest. The decision was affirmed in June 2012 by the United States Court of Appeals for the Second Circuit.[2]

The amount awarded was considerably less than the $86.6 million in fees, allegedly representing one percent of the entire face amount or aggregate value of all the Capital Transactions, claimed by Bison. The District Court found no evidence in the record that the parties had discussed the meaning of "aggregate value" during their contract negotiations, nor a mechanism by which to calculate the value to ATP of events such as the "loosening of loan covenants." The court found that Bison failed to meet its burden to prove by a preponderance of the evidence that the definition of "aggregate value" in paragraph 2 (b) of the Contract equaled "the total face amount of indebtedness, including both new and old funds." Instead, the court held that pursuant to paragraph 2 (b), "aggregate value" meant "the value of the new funds made available to ATP in a Capital Transaction."

Paragraph 7 of the Contract, referring to the 12-month period between April 1, 2004 and March 31, 2005, was found "reasonably susceptible to different interpretations." Wells testified that the date of March 31, 2005 was the "cut-off for triggering Bison's right to perpetual fees, rather than a cut-off for Bison's right to fees altogether." Taken at face value that would mean, concluded Judge Stein, that because Bison and ATP entered into a Capital Transaction prior to April 1, 2005, their Contract

[2] *See Bison Capital Corp. v. ATP Oil & Gas Corp.* (473 Fed Appx 40).

"impose[d] a continuing, perpetual obligation to pay Bison one percent of any Capital Transaction entered into between ATP and Credit Suisse until the end of time." The court chose not to give credence to this testimony, however, because in a letter dated October 15, 2004 to ATP, in which Wells explained why Bison was entitled to "the additional 1 % fee" based on the second Capital Transaction, Wells pointed out that the Capital Transaction had been made "*within the applicable time frame*," that is to say, before April 1, 2005. In other words, the fee agreement had an end date. This explanation was consistent with the understanding expressed by the ATP representatives.

After judgment was entered, the question for Bison was whether to enforce it pending appeal. Defendant explained in a lengthy email to Bison, dated May 5, 2011, that it had "given careful consideration to whether execution on the judgment now would undermine your appeal," and that the current law was somewhat unsettled. Specifically, certain older Second Circuit decisions applied the rule that a party who accepts the benefit of a judgment may not appeal, a more recent decision held otherwise. While one U.S. Supreme Court decision held that the respondent-government's acceptance of the amount awarded did not manifest an intent to release its claim for additional recovery, citing *United States v E.B. Hougham* (364 U.S. 310 [1961]), more recently it had refused to review a Fifth Circuit decision holding that the plaintiff, which had expressly reserved its right to appeal when it executed consent to the judgment, nonetheless had waived its appeal by accepting the benefit of a judgment, citing *Amstar Corp. v. Southern Pacific Transport Co. of Texas and Louisiana* (449 U.S. 924 [1980]).

The email explained some of the advantages and disadvantages of waiting to enforce or enforcing immediately but made no explicit recommendation. In a subsequent lengthy email from defendant to Bison dated May 26, 2011, describing the unsuccessful mediation between defendant and ATP's counsel before the Second Circuit, defendant reiterated that it "remain[ed] of the view that a substantial risk remains that the appeal would be mooted and that the safest course would be to wait for payment of the judgment until after the appeal has concluded."

According to Bison, Wells instructed defendant "to follow the precedent approved by the United States Supreme Court in *Hougham* by filing a lien on ATP's assets," and that defendant did not do so. In June 2012, after the Second Circuit issued its affirmance, defendant informed Bison that the judgment was not then enforceable in New York or Texas (where ATP had assets) because it was required to state the interest amount ATP owed Bison and, for enforcement in Texas, to include an order stating attorneys' fees and other expenses to be reimbursed by ATP.

Bison then terminated defendant's services. Its new counsel filed a request for an amended judgment which was issued by the District Court, over ATP's objection, on August 15, 2012, holding that ATP owed prejudgment interest of $899,075.35, and a total of $2,549,075.35. Two days later, ATP filed for bankruptcy. Bison was listed as ATP's eighth largest unsecured creditor.

Bison commenced this action against Hunton and Williams in April 2015. It alleged five causes of action: (1) legal malpractice; (2) breach of contract; (3) breach of

fiduciary duty; (4) negligence, and (5) fraud. Bison alleged that defendant's performance before and during the trial was deficient: it did not call an expert witness to explain junk bond financings, did not introduce the ATP reports filed with the Securities and Exchange Commission ("SEC") to explain ATP's agreement to pay Bison continuing compensation for ATP financings arranged by Credit Suisse, and did not rebut attacks on Wells. Bison also claimed that defendant violated its promise that a particular litigation partner would be integrally involved in taking the depositions and trial preparation and failed to seek enforcement of the judgment when ATP had sufficient assets.

By decision and order dated July 28, 2016, I granted defendant's motion to dismiss the complaint, except for the second cause of action to the extent it alleged that defendant had breached the terms of the retainer agreement with Bison because the promised partner did not conduct certain depositions. At that time, I held that Bison's malpractice claims were "plainly disagreements with Hunton & Williams professional decisions related to trial strategy and [ ] not actionable as a matter of law." Further, I held that the claims of breach of fiduciary duty, negligence and fraud were redundant of the legal malpractice claim.

Bison then moved for leave to file a second amended complaint, which I granted in part by decision and order dated January 12, 2018.

In its second amended complaint, Bison again alleges causes of action for breach of contract, legal malpractice, and also violation of New York Rules of Professional Conduct and Disgorgement. In the breach of contract cause of action, Bison alleges that

despite the terms of the retainer agreement, defendant's management committee "allow[ed]" the "high-profile litigation partner" who was designated to "manage" the litigation and "conduct all significant depositions," to "disappear" and delegate his responsibilities to "more junior" attorneys. The partner's time records from April 23, 2010 through December 6, 2010 show no hours logged on the Bison/ATP matter, even after Magistrate Judge Peck's Report and Recommendation entered in June 2010 found that the agreement's compensation terms were ambiguous. Bison claims that because of the absence of the designated partner during much of the trial preparation, numerous errors were made, including the decision by the less-experienced partner who primarily handled the litigation that there was no need for expert testimony about fee practices.

Bison further alleges that defendant did not "comply with its basic disclosure obligation under Federal Rule of Civil Procedure ["FRCP"] 26" because it did not identify the ATP SEC reports as documentary evidence which would have provided the trial court with background information about industry practices and the circumstances leading to the parties' agreement for "evergreen" fee provisions. ATP's counsel had filed a motion in limine to bar the exhibits at trial and Judge Stein "appeared unwilling to overlook" defendant's failure to disclose. In order to hide its procedural mistake and avoid a negative ruling by the trial court, defendant then "purposefully misstat[ed] the[ ] relevance" of the SEC reports and agreed, although not authorized to do so, that the reports would not be used.

Defendant also agreed to stipulate, although allegedly not authorized by Bison, that ATP was in dire financial condition in the first quarter of 2004. The stipulation provided no factual context to explain the "evergreen" fee structure, namely that ATP was completely dependent on Bison for help after four years of loan violations, breached promises to comply with loan covenants, and repeated unsuccessful attempts to obtain a new financing source. According to Bison, the stipulation revealed the designated partner's lack of understanding of the claims or the evidence needed to support them. He was unprepared to rebut false claims made by ATP witnesses at trial, including that ATP had several financing sources available and would not have entered into the agreement if it had known that Bison wanted "evergreen" fees. As there was no expert testimony or SEC reports to contradict ATP, it succeeded in portraying Bison's interpretation of the fee agreement as unreasonable. The "direct and foreseeable result" of the breaches of the retainer agreement, as well as other promises to Bison, was that Bison was unable to establish its claims against ATP, damaging it "in an amount to be determined at trial."

For its malpractice cause of action, Bison alleges that defendant failed to exercise reasonable care, skill and diligence in its representation of Bison. Defendant did not satisfy FRCP 26 requirements and then chose not to use the SEC reports at trial after insufficiently stipulating as to the evidence they would have showed; defendant did not diligently and thoroughly prepare for trial and did not understand importance of customary junk bond fee practices when deciding that expert testimony was not needed to clarify any ambiguity in the agreement; defendant ignored Wells' instruction to file a lien

on ATP assets so as to safeguard Bison's awarded judgment and did not assign counsel competent in the enforcement of judgments nor take prompt steps to render the judgment enforceable.

Bison contends that but for defendant's negligence, Bison would have recovered $112 million plus interest owed by ATP as of March 21, 2011 for all 13 financings, $9.3 million that the federal court found ATP owed by that same date for the two financings, plus interest, and $2.55 million, plus additional interest to which Bison was entitled under the trial court's March 21, 2011 judgment. In its third cause of action, Bison alleges that defendant violated its obligations of competence and diligence under Rules 1.1. and 1.3 of the New York Rules of Professional Conduct.

Defendant now moves to dismiss the complaint, arguing that Bison is again unable to meet the required pleading standard under CPLR 3211.

First, as to Bison's claim of malpractice, defendant argues that Bison cannot prove the "case within a case" requirement of a successful claim of malpractice that would establish its actions were the proximate cause of Bison's failure to obtain the amount of the fees it claims it was owed. In particular, the contents of Wells' October 14, 2004 letter, explaining the terms of the parties' agreement, did not actually describe an "evergreen" agreement; there was therefore no need for extrinsic evidence, either through the SEC reports or by an expert versed in the junk bond sector, to establish what constitutes an evergreen agreement and its function. This completely negates Bison's allegation that but for defendant's strategic decision to rely solely on Wells' testimony

for the explanation of the ATP agreement, the district court would have interpreted it differently. Further, the actions Bison identifies as "malpractice" -- not using the SEC reports; relying solely on Wells' testimony rather than retaining an expert; and not executing on the judgment immediately -- were defendant's reasonable and prudent strategic decisions.

Additionally, defendant argues that although Bison contends that Judge Stein did not understand the severity of ATP's financial situation which would have been proved by the SEC reports, it is pure speculation that introduction of the SEC reports would have made a difference in the outcome of the trial. Defendant's advice not to execute judgment during the pendency of the appeal was strategic and reasonable. Further, there is nothing in the exhibits of the second amended complaint to show that Bison instructed defendant to proceed with execution of the judgment.

Defendant further argues that the breach of contract cause of action is duplicative of Bison's malpractice claim. In addition, it argues, any claim for damages based on the alleged absence of the contractually designated partner during the trial preparation would be purely speculative.

In opposition, Bison first argues that its actual claim is that defendant failed to follow Bison's instructions to file a lien. It was Bison's right, as defendant's client, to decide whether to file a lien on ATP assets. Bison provided an affidavit by Wells in which he avers that he gave such an instruction. Further, ATP's SEC reports indicate that

it had "$660 million in operating cash flows and financing proceeds" in 2011 and 2012 to satisfy the judgment.

Bison further argues that defendant's "entire litigation strategy" focused on the SEC report disclosures, and they were referred to twenty-one times in the federal litigation's Proposed Findings of Fact in order "to establish crucial facts about ATP's surrounding circumstances" when the parties entered into the agreement. The agreed-upon stipulation at trial, and defendant's stated position that the SEC reports were unnecessary and would not be used at trial, seriously undermined the entire case and constitutes malpractice. Based on the magistrate judge's statement that the agreement was ambiguous, defendant should have provided a trial expert to clarify the meaning of "value" in the junk bond context and explain Bison's fees claim, in particular that using the face amount to calculate fees is common in the junk bond industry.

As for the "case within a case," defendant relies on "a single ambiguous sentence containing the phrase 'financial arrangements,' which Judge Stein misconstrued to undermine Bison's contract interpretation" to claim that even if the SEC reports and expert testimony had been introduced at trial and defendant had used the available evidence to rebut the ATP witness's false testimony, Judge Stein would have nonetheless interpreted the agreement in the same manner. Bison deserves an opportunity for a jury to decide if the term "financial arrangements" was misinterpreted.

Bison next argues that the breach of contract cause of action is not duplicative of the malpractice cause of action because it states allegations based on specific contractual promises, none of which Bison waived. Defendant promised to obtain an enforceable judgment against ATP, and this is an independent breach of its retainer agreement separate and apart from defendant's negligent failure to follow Bison's instruction to enforce the judgment pending appeal of Judge Stein's decision. The retainer promised a specific partner to conduct depositions and prepare thoroughly for the trial. Bison never waived its contractual rights to have the retainer's designated attorney take the depositions.

In reply, defendant argues although Bison maintains that the SEC reports and expert testimony would have shown why ATP agreed to pay "evergreen" fees, the fundamental flaw is that Wells' own written words show that the reports were unnecessary. Whether "evergreen fees" are "industry practice" in junk bond financing is not relevant. Wells' letter completely undermines any allegation that "but for" defendant's conduct, Bison would have received a greater award against ATP.

Defendant also argues that contrary to Bison's contention, the district court never made a ruling that defendant violated FRCP 26. Rather, during the discussion at trial about the need for the SEC reports, Judge Stein opined that he thought it was a "waste of time" to pursue showing how financially precarious ATP's financial state was at the time, and that a stipulation to the effect that "ATP desperately needed a capital infusion" would suffice. Further, contrary to Bison's portrayal, the district court decision clearly shows

Judge Stein's understanding in its description of ATP's condition in early 2004 as one of "financial distress," "fail[ing] to meet various covenants in its loan agreements with . . . the lending arm of Cerberus Capital Management," facing "looming" and "[s]evere financial consequences," and "need[ing]" both "a capital infusion by . . . the end of its first fiscal quarter, to avoid having a 'going concern' qualification added to its auditor's opinion on its financial statements," and "a new, long term-source of capital to replace [its current lender] and finance its multi-year developmental programs." These facts are "the very conclusions that Bison contends it sought to show through the SEC reports."

Discussion

The Legal Malpractice Cause of Action

An action for legal malpractice requires proof: (1) of the negligence of the attorney; (2) that the negligence was a proximate cause of the loss sustained, and (3) of actual damages. *See Excelsior Capitol LLC v. K&L Gates LLP*, 138 A.D.3d 492, 492 (1st Dept. 2016) (internal quotation marks and citation omitted) *lv denied* 28 N.Y.3d 906 (2016). The complaint must sufficiently allege that the attorney did not exercise the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442 (2007). "But for" the attorney's actions, the plaintiff would have prevailed or not suffered ascertainable damages. *Id.*

Allegations in support of a legal malpractice claim that are conclusory, speculative or contradicted by the documentary evidence will be dismissed, even if there

was negligence. *See Katz v. Essner*, 136 A.D.3d 575, 576 (1st Dept. 2016). An attorney will not be found negligent for an error of judgment simply because it leads to an unsuccessful result. *See Rosner v. Paley*, 65 N.Y.2d 736 (1985). Dissatisfaction with strategic choices does "not support a malpractice claim as a matter of law." *Bernstein v. Oppenheim & Co.*, 160 A.D.2d 428, 431 (1st Dept. 1990). Attorneys are not held to a rule of infallibility and will not be found liable for honest mistakes of judgment "where the proper course is open to reasonable doubt." *Id.* at 430.

The burden is on the attorney to "offer a reasonable strategic explanation for the alleged negligence." *Ackerman v. Kesselman*, 100 A.D.3d 577, 579 (2nd Dept. 2012)(internal quotation marks and citation omitted). It is only when there is no showing of reasonable decision-making that a "determination [of whether] a course of conduct constitutes malpractice require[ ] findings of fact." *Bernstein v. Oppenheim*, 160 A.D.2d 428, 430 (1st Dept. 1990).

The overriding problem with Bison's claims of malpractice based on defendant's failure to produce an expert on junk bond "evergreen" fees is that, *as stated by the district court and affirmed by the Second Circuit*, Wells' own October 15, 2004 letter to ATP articulated the terms of the parties' agreement, which was that fees were owed for any transaction prior to the twelve-month period following termination of the agreement. Defendant decided in its professional judgment related to trial strategy that Wells, the drafter of the agreement and identified in paragraph three of the second amended complaint as a "financial advisor with a great deal of experience in oil and gas financing

[who] had high-level contacts at financial institutions," was able to testify sufficiently about junk bond financing and terms of the parties' agreement. Bison has not sufficiently alleged that despite this letter, had defendant performed differently, it would have achieved a better result. *See Warshaw Burstein Cohen Schlesinger & Kuh, LLP v. Longmire,* 106 A.D.3d 536, 537 (1st Dept. 2013) *lv dismissed* 21 N.Y.3d 1059 (2013). In any event, if there was error, it is shielded by the attorney judgment rule. *See Ackerman v. Kesselman,* 100 A.D.3d at 579.

Similarly, although Bison contends that defendant should not have stipulated to ATP's financial precariousness in early 2004 or tell the district court that the SEC reports were not necessary for the trial, I find that defendant reasonably and strategically chose not to put the reports into evidence, given Judge Stein's comments that they would be "a waste of time," and that the parties should stipulate about ATP's financial condition. As contended by Bison, the purpose of the SEC reports was to set forth ATP's dire financial plight when it met Bison. However, ATP's situation was clearly understood by the district court whose factual findings summarized the many financial crises facing ATP in early 2004.

I also find that defendant's letters to Bison on May 5, 2011, weighing the status of the law on enforcing a judgment prior to obtaining a ruling on appeal, and May 11, 2011, reiterating defendant's concerns about the law and the possibility Bison would be found to have waived entitlement to a larger damage award, show defendant expressing

reasonable and prudent reasons for choosing to wait until the Second Circuit ruled, before seeking to enforce the judgment.

That ATP would declare bankruptcy within two days after the perfected judgment was filed could not be anticipated. "Hindsight arguments" concerning selection of one of several reasonable courses of action, do not state a cause of action for malpractice. *Brookwood Cos., Inc. v. Alston & Bird LLP*, 146 A.D.3d 662, 667 (1st Dept. 2017).

In sum Bison has not sufficiently pled that defendant acted without the requisite standard of care, nor that its conduct was the proximate cause of Bison's damages. Its allegations are based on its dissatisfaction with defendant's strategic choices and do not form the basis for a claim of malpractice. To the extent it argues that certain of Bison's decisions were unauthorized, this is belied by Wells' active presence throughout the trial. The cause of action sounding in malpractice is therefore dismissed for failure to state a cause of action.

The Breach of Contract Cause of Action

To state a claim for breach of contract, a party must establish the existence of a valid contract, the plaintiff's performance of its obligations, the defendant's breach, and damages resulting from the breach. *See VisionChina Media Inc. v. Shareholder Representative Servs.*, LLC, 109 A.D.3d 49 (1st Dept. 2013).

Although this cause of action as stated in the first complaint survived the defendant's prior motion to dismiss, defendant's arguments advanced now warrant a dismissal of this cause of action as stated in the SAC.

The February 27, 2004 Contract between Bison and ATP refers to the designated attorney in its discussion of fees, where it states the following:

> "[a]t this juncture, it is contemplated that [the designated attorney], [the attorney who conducted most of the trial] or one or two associates based in either Miami or New York would be assigned to this case….. At your request, [the designated attorney] will conduct all significant depositions in the case and will participate in the trial, should the case actually proceed to trial."

It is not disputed that the designated attorney did not conduct any of the depositions. However, Bison's contention that had the designated attorney conducted the depositions and meaningfully participated in the trial preparations, Bison would have won the damages it sought in the underlying action, is pure speculation. Further, as defendant properly argues, there is no allegation of damages specific to the taking of the depositions, and damages cannot be reasonably inferred from the allegations stated. Damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to a breach of contract. *See generally Assured Guar. Corp. v EMC Mtge*., LLC, 39 Misc. 3d 1207(A) (Sup. Ct. N.Y. Co., 2013).

The claim that defendant ignored Wells' instruction to enforce the judgment is insufficiently pled. As argued by defendant, the SAC contains "280 pages of exhibits" but is silent as to an instruction from Wells to secure the judgment which was ignored by defendant. In response, Bison has provided an affidavit by Wells in which he avers, very generally, that defendant ignored his instruction, and now argues that because this is a CPLR 3211 motion, the averment is sufficient to withstand dismissal. The bare statement

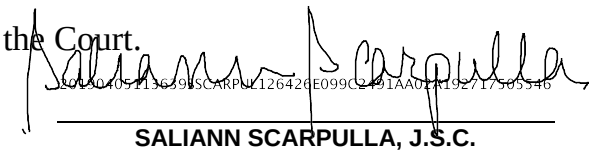
that an instruction was given, and the absence of even an averment as to the manner in which Wells gave his instruction, or to whom and when, is insufficient to withstand dismissal. To the extent Bison argues that defendant promised to secure a judgment, this was accomplished; the retainer does not include an express promise as to a particular monetary result. *See Winegrad v. Jacobs,* 171 A.D.2d 525, 525 (1st Dept. 1991), a*ppeal dismissed* 78 N.Y.2d 952 (1991).

I have considered Bison's remaining arguments in support of its breach of contract cause of action and find them to be unavailing. In addition, Bison's cause of action alleging that defendant violated Rules 1.1 and 1.3 of the Rules of Professional Conduct is without merit. "[T]here is no private right of action for a violation of the Code of Professional Responsibility." *Kantor v. Bernstein,* 225 A.D.2d 500, 501-502 (1st Dept. 1996)(internal citations omitted).

In accordance with the foregoing, it is hereby

ORDERED that defendant Hunton & Williams LLP's motion to dismiss the second amended complaint is granted, and the Clerk of the Court is directed to enter judgment in favor of defendant dismissing this action.

This constitutes the decision and order of the Court.



4/5/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☐	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE